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## April 6, 2010

# DEPARTMENT OF ENERGY OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: December 29, 2009

Case Number: TSO-0874

This Decision concerns the eligibility of XXXXXXXXXXXXXX (the Individual) to obtain his access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual is eligible for access authorization. After reviewing the evidence before me, I find that the Individual should be granted access authorization.

## I. Background

The Individual is employed by the Department of Energy (DOE). He applied for a security clearance in July 2009 in connection with his employment. The Individual completed a Questionnaire for National Security Positions (QNSP) in order to obtain his access authorization. Information supplied on the QNSP raised legitimate security concerns and,

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<sup>&</sup>lt;sup>2</sup>/ Access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5(a).

therefore, the Individual was summoned for an interview with a Personnel Security Specialist from the DOE's Local Security Office (LSO). After reviewing all of the information in the Individual's personnel security file, including the transcript of the Personnel Security Interview (PSI), the LSO determined that derogatory information existed that cast into doubt the Individual's eligibility for a security clearance. The manager of the local DOE office informed the Individual of this determination in a letter that set forth in detail the LSO's security concern and the reasons for that concern. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the Individual that he was entitled to a hearing before a Hearing Officer in order to resolve the doubt concerning his eligibility for access authorization.

The Notification Letter included a statement of derogatory information that created a substantial doubt as to the Individual's eligibility to hold a clearance. This information pertains to the Individual's illegal drug use, including marijuana, mushrooms, and LSD. This derogatory information also pertains to the Individual's possession and use of Valium, including illegally transporting it to the United States and using it without a prescription. Information of this type is defined as derogatory in paragraph (k) of the criterion for eligibility for access to classified matter or special nuclear material. I will hereinafter refer to paragraph (k) as Criterion K.

The Individual's illegal possession, use, and transport of Valium is also defined as derogatory under paragraph (l) of the criterion for eligibility for access authorization. <sup>4</sup>/ Also raised as derogatory information under paragraph (l) was the Individual's illegal drug use and his association with family members who use illegal drugs in his presence. I will hereinafter refer to paragraph (l) as Criterion L.

The Individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals (OHA), and I was appointed the Hearing Officer. The DOE entered 10 exhibits into the record. The Individual presented the testimony of four witnesses, in addition to testifying himself. The exhibits will be cited in this Decision as

<sup>&</sup>lt;sup>3</sup>/ Criterion (k) pertains to information indicating that the Individual has "sold, transferred, possessed, used, or experimented with a . . . substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, . . . etc.) except as prescribed or administered by a physician" or otherwise authorized by federal law. 10 C.F.R. § 710.8(k).

<sup>&</sup>lt;sup>4</sup>/ Under criterion (l), information is derogatory if it tends to show that the Individual is not honest, reliable, or trustworthy; or if it furnishes reason to believe that he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interests of national security. 10 C.F.R. § 710.8(l).

"Ex." followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as "Tr." followed by the relevant page number.

## II. Regulatory Standard

#### A. The Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Dep't of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of the national security test" for the granting of security clearances indicates that "security-clearance determinations should err, if they must, on the side of denials.") *Dorfman v. Brown*, 913 F.2d 1399, 1403 (9<sup>th</sup> Cir. 1990) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

# B. Basis of the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.* 

# III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites two criteria as bases for suspending the Individual's security clearance, Criteria K and L. To support the criteria, the LSO relies on the

Individual's illegal use of marijuana, mushrooms, LSD, and Valium and his association with family members who use illegal drugs in his presence. Also, the LSO relies on the fact that the Individual signed a security acknowledgment certifying his understanding that involvement with illegal drugs could result in the loss of his access authorization, but he continued to be in the presence of illegal drug use by his immediate family. Finally, the LSO relies on statements the Individual made at the PSI that indicate that he did not believe marijuana and mushroom use to be any worse than consuming alcohol.

I find that the information set forth above constitutes derogatory information that raises questions about the Individual's drug use under Criterion K. The security concerns associated with Criterion K are as follows: "misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulation." Guideline H of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines). Finally, the information set forth above constitutes derogatory information that raises concerns about the Individual's personal conduct. The security concerns associated with Criterion L are as follows: "conduct involving questionable judgment, lack or candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." Guideline E of the Adjudicative Guidelines.

## IV. Findings of Fact

During his PSI, the Individual admitted that he had used illegal drugs, including marijuana, mushrooms, and LSD. Ex. 1, Attachment 1 at 1. He stated that he used marijuana approximately once or twice a year for a period of 20 years, mushrooms four times, and LSD once. He also admitted that in 1993 he legally purchased Valium in Chile and illegally transported it into the United States. Ex. 1, Attachment 1 at 1. Further, he used the Valium between 1993 and 1995 without a prescription in the United States. Ex. 1, Attachment 1 at 1. The Individual also admitted that, as late as August 2009, members of his immediate family, specifically his father, used illegal drugs in his presence. Ex. 1, Attachment 1 at 1.

## V. Analysis

I have thoroughly considered the record of this proceeding including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the Individual's eligibility for access authorization, I have been

guided by the applicable factors prescribed in  $10 \text{ C.F.R.} \S 710.7(c)^{5/}$  and the Adjudicative Guidelines. After due deliberation, I have determined that the Individual's access authorization should be granted. I find that granting the Individual's DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest.  $10 \text{ C.F.R.} \S 710.27(a)$ . The specific findings that I make in support of this decision are discussed below.

#### A. Criterion K

Although the Individual stated during the PSI and on the QNSP that he had used illegal drugs, during the hearing it became apparent that his drug use was minimal. He testified that his last drug use was in June 2007, when he used mushrooms while hiking on the Continental Divide. Tr. at 55. His friend, with whom he has been acquainted for 17 years and who accompanied him on the trip, confirmed this date. Tr. at 40, 41. Both testified that the Individual's father gave them the mushrooms, which they carried through two states before using it. Tr. at 44, 56. The Individual's wife testified that the last time she saw the Individual use drugs was in 2005. Tr. at 10. The Individual's father testified that he saw his son use drugs once in his life. Tr. at 90. The Individual testified that although he started using drugs at an early age, approximately 14 or 15, his use was infrequent. Tr. at 6. He testified, as did his friend, that he never purchased illegal drugs. Tr. at 49, 68. The Individual and his wife testified that now that they have a child they have decided that illegal drugs have no place in their lives. Tr. at 16, 56. I find that the Individual has mitigated the concern raised by his marijuana, mushroom, and LSD use. His last use of mushrooms was in June 2007, more than two years prior to the date of the hearing. He has consistently stated that he used mushrooms only four times in his life. Tr. at 66; Ex. 9 at 20. While his marijuana usage was more common, 20 to 40 times over a period of 20 years, he testified that he last used marijuana in 2005 more than four years prior to the date of the hearing. Tr. at 66. He only used LSD on one occasion in 1993. Ex. 9 at 28-29. Illegal drug use is a very serious matter, however, I find that the infrequency of his use along with how far in the past it occurred mitigates the security concern. He was 21 when he tried LSD, 13 when he first tried marijuana, and 14 when he first tried mushrooms. He stated at the PSI that he only used marijuana one to two times a year. He maintains that he used mushrooms only four times in his life. He convinced me that he has matured and realizes that he has responsibilities such as his child, his job, and his marriage that do not lend

Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation, and other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant material factors.

themselves to a lifestyle that includes illegal drug use. I find that the Individual has mitigated the concern raised in connection with his marijuana, mushroom, and LSD use.

A second concern raised under Criterion K is the Individual's legal purchase of Valium in Chile which he then brought into the United States illegally. Ex. 1, Attachment 1 at 1. The Individual also used the Valium in the United States without a prescription. Ex. 1, Attachment 1 at 1. The Individual explained that he purchased the Valium in Chile because he had a long return flight to the United States. Tr. at 69. The flight stopped four times before it arrived in Miami. Tr. at 69. He wanted to be able to sleep during the flight. Tr. at 69. At that time, he did not realize that it was illegal to bring the Valium back into the United States, although he purchased it legally in Chile. Tr. at 69. He also testified that he used the Valium two other times on long plane flights. Tr. at 71. These events occurred more than 15 years ago. This possession, use, and transportation of illegal drugs occurred one time, although he has traveled extensively to other countries since that time, with many opportunities to purchase drugs which require a prescription in the United States, but has not done so. Further, he was only 21 when he purchased the Valium. I find that the Individual has also mitigated the concern raised by his possession, use and transportation of Valium.

## B. Criterion L

The LSO also raised security concerns indicating that the Individual has engaged in unusual behavior, is not honest, reliable, or trustworthy, and may be subject to blackmail or coercion. The LSO listed three items of derogatory information to support this security concern. First, the LSO indicated that the Individual continues to associate with immediate family members who use illegal drugs in his presence. Second, the LSO indicated that the Individual admitted he used illegal drugs as recently as 2007. Third, the LSO indicated that the Individual illegally used, possessed, and transported Valium into the United States.

The Individual testified, as did his wife and his father, that his father does not use illegal drugs in the Individual's presence anymore. Tr. at 23, 80, 90-91. He has indicated to his father that he cannot use illegal drugs in his presence, nor can he bring them to the Individual's family home. The Individual and his wife both testified that they assume that his father has illegal drugs in his home, but they do not visit more than four times a year. Tr. at 23, 76. The Individual testified that he could not recall the last time he saw his sister use illegal drugs. Tr. at 77-78, 85. He has told his sister that illegal drug use is unacceptable in his presence.

This Office has found on previous occasions that individuals should take appropriate steps to distance themselves from people who engage in the use of illegal drugs. However, similar to this case, the users of illegal drugs have sometimes been family members, from whom a person cannot simply withdraw. *See*, *e.g.*, *Personnel Security Hearing*, Case No. TSO-

0766 (November 25, 2009) (access authorization restored where wife set very clear rules against husband's possessing or using illegal drugs in her presence or in her vehicle). Under the present circumstances, for example, the individual cannot realistically be expected to disassociate himself entirely from his father or sister. I further find that the steps he has taken to mitigate his exposure to their illegal drug use weigh heavily in his favor. I, therefore, find that the Individual has mitigated the concern raised by his family members illegal drug use in his presence.

As to the second item of derogatory information raised by the LSO in connection with Criterion L, the Individual stated that he did not feel that the effects of marijuana were any different than alcohol and that some of the ills associated with marijuana would be reduced if it were legalized. Ex. 9 at 45. The Individual testified at the hearing that he will not use illegal drugs in the future whether he is granted a security clearance or not. Tr. at 83. He stated that he and his wife have made a conscious decision not to use illegal drugs again. Tr. at 56. His wife testified that the Individual is one of the most law abiding people that she knows. Tr. at 26. She stated that he does not exceed the speed limit. Tr. at 26. Further, she claimed that he does not like to take over the counter medication such as Advil, and he does not drink coffee. Tr. at 26. My reading of the PSI transcript shows that the Individual was attempting to differentiate between illegal drugs that he believed were harmful and artificial and other illegal drugs which he believed were more natural. Ex. 9 at 17, 21. While he understood that marijuana and mushrooms were illegal, he did not believe they were harmful to him. He understands that the use of illegal drugs can cause substantial problems for him. Also, he is motivated to set a good example for his young son by not using illegal drugs again. The Individual and his wife were both credible when testifying that they never intend to use illegal drugs again. I, therefore, find that the Individual has mitigated the security concern raised by his expressed opinion at the PSI that using marijuana and mushrooms was equivalent to alcohol use.

As to the third item of derogatory information raised by the LSO in connection with Criterion L, the Individual's last drug use was in June 2007, more than two years prior to the date of the hearing. As stated above, his use was infrequent and in the past. Further, his family life has changed and he testified that illegal drug use is no longer acceptable to him or his wife. I found both the Individual and his wife to be credible on this issue. I do not think they were perjuring themselves about this issue merely so the Individual could keep his job and obtain his access authorization. They now have a young child, who is important to both of them. They wish to set a good example for him, and in their minds, that includes not using illegal drugs. I find that the Individual has mitigated the security concern raised about his illegal drug use.

Finally, the Individual legally purchased Valium in Chile in order to sleep on the long flight to Florida. He then brought the drug into the United States and used it, all without a prescription. These actions occurred more than 15 years prior to the hearing. As stated

above, due to the Individual's age, 21 years, when he brought the Valium to the United States and the infrequency of this action, along with the distance in time in which it occurred, I find that the Individual has mitigated the security concern raised by his possession, use, and transport of Valium into the United States.

#### V. Conclusion

As the foregoing indicates, the Individual has resolved the security concerns cited in the Notification Letter under Criteria K and L. Therefore, I conclude that the Individual has shown that granting him access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the Individual should be granted access authorization at this time. The parties may seek review of this decision by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Janet R. H. Fishman Hearing Officer Office of Hearings and Appeals

Date: April 6, 2010